

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7750

Petition of Lamoille County Sheriff's Department,)
Vermont Communications Board, and Vermont)
Transco LLC, for authority to install a wireless)
communications facility in Hyde Park, Vermont)

Order entered: 11/7/2011

I. INTRODUCTION AND BACKGROUND

In this proposal for decision, I recommend that the Vermont Public Service Board ("Board") approve the petition filed by Lamoille County Sheriff's Department, Vermont Communications Board, and Vermont Transco LLC ("VELCO") (collectively, the "Petitioners") pursuant to 30 V.S.A. Section 248a, and grant the Petitioners a certificate of public good ("CPG") authorizing the construction of a telecommunications facility in the Town of Hyde Park, Vermont.

On May 20, 2011, the Petitioners filed a petition and prefiled testimony requesting that the Board issue a certificate of public good ("CPG"), pursuant to 30 V.S.A. § 248a, authorizing the construction of a wireless telecommunications facility to be located in the Town of Hyde Park, Vermont (the "Project"). The Project originally involved the construction of a new 120-foot self-supporting lattice tower and associated antennas and operating equipment near an existing 90-foot guyed tower (the "Manosh Tower") on property owned by Neil and Russell Jones (the "Jones Property") in Hyde Park, Vermont.

On June 3, 2011, the Town of Hyde Park Planning Commission filed, via e-mail, a letter with the Board stating that the Planning Commission "disapproves of the Project" because it does not comply with certain zoning bylaws listed in the letter.¹

On June 9, 2011, H.A. Manosh, Inc. ("Manosh"), the owner of the existing Manosh Tower, filed comments in opposition to the petition.

1. Planning Commission letter at 1.

On June 10, 2011, the Vermont Department of Public Service filed a letter with the Board recommending that the Board issue an order approving the Project without further hearing or investigation.

On June 10, 2011, David L. Grayck, Esq., Cheney, Brock & Saudek, P.C., submitted a combined filing comprised of comments in opposition to the Project, motions to intervene, and a request for hearing on behalf of James Allister, Frederic Gluck, Gerette Buglion, Colyn Case, Nancy Case, John Clark, Judy Clark, Lisa Dimondstein, Mark Dimondstein, Melissa Dimondstein, Mary Miller, and Michael Ryan (together, the "Neighbors"), neighboring landowners to the parcel on which the Project is proposed to be located. The Neighbors also filed affidavits, prefiled testimony and exhibits in support of their opposition to the Project, including testimony from Jean Vissering addressing aesthetic impacts.

On June 20, 2011, the Petitioners filed a response to the letter submitted by the Hyde Park Planning Commission.

On June 27, 2011, the Petitioners filed a response to the combined filing of the Neighbors and the comments filed by Manosh. In addition, the Petitioners filed a motion to strike certain testimony and exhibits submitted by the Neighbors in support of their combined filing.

On June 27, 2011, David L. Grayck, Esq., filed a notice of withdrawal as counsel for the Neighbors.

On July 5, 2011, the Hyde Park Planning Commission filed a reply to the Petitioners' response to the Planning Commission's letter.

On July 5, 2011, Daniel Richardson, Esq., Tarrant, Gillies, Merriman & Richardson, filed a notice of appearance on behalf of the Neighbors and a motion for extension of time to reply to the Petitioners' June 27 filing.

On July 5, 2011, Manosh filed a request for permission to file surreply, a surreply to Petitioners' response to Manosh's opposition, and a motion to intervene in the proceeding.

On July 11, 2011, Petitioners filed a response to the Neighbors' motion for extension of time.

On July 15, 2011, Petitioners filed a response to Manosh's July 5 filings.

On July 22, 2011, the Neighbors filed a surreply to the Petitioners' response to their combined filing.

On July 28, 2011, I issued a procedural order granting the Neighbors' request for intervention in this docket and denying Manosh's intervention request.

On August 11, 2011, I conducted a site visit to the proposed Project location which was attended by the Petitioners, the Neighbors, and the Department.

On August 23, 2011, I convened a technical hearing in this docket which was attended by the Petitioners, the Neighbors, and the Department. At the hearing, the Petitioners and the Neighbors jointly announced that they had negotiated a settlement agreement in the case, and planned to file a memorandum of understanding describing the terms of that agreement with the Board.

On September 6, 2011, the Petitioners filed a memorandum of understanding (the "MOU"), signed by both the Petitioners and the Neighbors, and a revised tower design with the Board.

On September 9, 2011, the Neighbors filed a letter from the Hyde Park Planning Commission stating that the commission consented to the MOU.

No other comments regarding the Project have been filed with the Board.

I have determined that the petition and prefiled testimony and exhibits, as revised, have effectively addressed the applicable substantive criteria of 30 V.S.A. § 248a. Consequently, I find that the procedure authorized by § 248a is sufficient to satisfy the public interest, and no further hearings are required. Pursuant to 30 V.S.A. § 8, and based on the record and evidence before me, I present the following findings of fact and conclusions of law to the Board.

II. FINDINGS

1. The Project will enhance public safety by accommodating the telecommunications needs of various entities including the Petitioners, electric distribution utilities, and emergency first responders. The Project is also part of VELCO's Statewide Radio Project ("SRP") which seeks to establish wireless coverage over much of the State of Vermont for purposes associated

with electric utility installation, repair and maintenance of infrastructure, and emergency response. Joint Panel pf. at 5-7, 12-14.

2. The Project is to be located at an existing telecommunications facility site at 125 Garfield Crossroads in Hyde Park, Vermont, on property owned by Neil and Russell Jones. The site currently includes the 90-foot-tall Manosh Tower. Joint Panel pf. at 6; MOU at 5.

3. The Project involves the installation of a new telecommunications tower with antennas, two equipment shelters, a generator and associated propane storage tank, and associated operating equipment within a new fenced compound on the subject property. Petitioners have also agreed to remove the existing tower at the site within six-months of commencement of construction of the Project. Joint Panel pf. at 15-16; MOU at 2, 5.

4. The Project facilities include a new lattice self-supporting tower, with a maximum height of 100 feet, with multiple antennas mounted at various heights on the tower. The equipment shelters will be approximately 12 feet by 24 feet and 10 feet by 12 feet, respectively. The propane-fueled generator will be located on an approximately 5-foot by 10-foot concrete pad with an above-ground propane storage tank mounted on a 5-foot by 12-foot platform. The 40-foot by 68-foot compound containing the proposed tower and equipment shelter will be enclosed by a 7-foot-high chain link fence. Joint Panel pf. at 15-16; MOU at 2; exhs. JP9-B1 and B3.

State Telecommunications Policy

[30 V.S.A. § 248a(a)]

5. The Project is consistent with the goal of directing the benefits of improved telecommunications technology to all Vermonters pursuant to 30 V.S.A. § 202c(b). The Project will contribute to the objectives of the SRP, a private mobile communications network, to improve worker safety and power outage recovery time by providing a means of communications among VELCO, utilities, and third-party contractors throughout Vermont. The Project will also enhance public safety by accommodating the telecommunications needs of various entities including the Petitioners, electric distribution utilities, and emergency first responders. Joint Panel pf. at 5-7, 12-14.

**Aesthetics, Historical Sites, Air and Water Purity,
the Natural Environment, and Public Health and Safety**

[30 V.S.A. § 248a(c)(1)]

6. The Project will not have an undue adverse effect on aesthetics, historical sites, air and water purity, the natural environment, and the public health and safety. This finding is supported by findings 7 through 26 below, which are the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a) (1)-(8) and (9)(k).

Outstanding Resource Waters, Headwaters

[10 V.S.A. §§ 1424a(d), 6086(a)(1)(A)]

7. The Project will have no impact on outstanding resource waters. No headwaters, drainage areas, watersheds or outstanding resource waters are located at the Project site. Connaughton/Smith pf. at 11; exhs. JP-7C-2 and JP-7C-3.

Water and Air Pollution

[10 V.S.A. § 6086(a)(1)]

8. The Project will not result in undue water or air pollution. This finding is supported by findings 9 through 11, below.

9. Dust associated with construction equipment will be controlled at the site. Smith/Tomberg pf. at 7.

10. Noise associated with construction activities will be short term, and noise from the generator, if activated, will be attenuated by enclosure within the equipment shelter. Smith/Tomberg pf. at 7.

11. The Radio Frequency Radiation associated with the Project will meet all standards prescribed by the Federal Communications Commission. Joint Panel pf. at 27-28; exh. JP-6B-10.

Waste Disposal

[10 V.S.A. § 6086(a)(1)(B)]

12. The Project does not involve disposal of wastes or injection of any material into ground water or wells. Smith/Tomberg pf. at 8-9.

Water Conservation, Sufficiency of Water, and Burden on Existing Water Supply

[10 V.S.A. §§ 6086(a)(1)(C),(a)(2) and (3)]

13. The Project will have minimal impact on water conservation measures, as the Project will not be connected to water supplies. Water requirements for the Project are restricted to potable water for the construction crews and potentially using water to cool drill heads used in Project construction. Smith/Tomberg pf. at 9-10.

Floodways

[10 V.S.A. § 6086(a)(1)(D)]

14. The Project is not located in a floodway. Smith/Tomberg pf. at 10.

Streams

[10 V.S.A. § 6086(a)(1)(E)]

15. The Project is not located near any streams. Smith/Tomberg pf. at 10.

Shorelines

[10 V.S.A. § 6086(a)(1)(F)]

16. The Project is not located on a shoreline. Smith/Tomberg pf. at 10.

Wetlands

[10 V.S.A. § 6086(a)(1)(G)]

17. The Project will have no impact on wetlands. Smith/Tomberg pf. at 11.

Soil Erosion

[10 V.S.A. § 6086(a)(4)]

18. The Project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water. All construction work will comply with Vermont standards and specifications for erosion and sediment control. Smith/Tomberg pf. at 11.

Transportation System

[10 V.S.A. § 6086(a)(5)]

19. The Project will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports or airways, and other means of

transportation existing or proposed. Traffic, following construction, will be limited to maintenance visits. Smith/Tomberg pf. at 13.

Educational Services

[10 V.S.A. § 6086(a)(6)]

20. The Project will not cause an unreasonable burden on the ability of a municipality to provide educational services. Educational services will not be impacted by the Project. Joint Panel pf. at 24-25.

Municipal Services

[10 V.S.A. § 6086(a)(7)]

21. The Project will not place an unreasonable burden on the ability of the local government to provide municipal or governmental services. The Project will not require any additional municipal or governmental services. Joint Panel pf. at 24-25.

Aesthetics, Historical Sites, and Rare and Irreplaceable Natural Areas

[10 V.S.A. § 6086(a)(8)]

22. The Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas. This finding is supported by findings 23 through 25, below.

23. Views of the Project tower will be limited to an area under one mile from the site. In addition, the Project will be located at an existing telecommunications facility which currently includes a 90-foot-tall tower. Buscher pf. at 5-6.

24. There are two historic sites within a half mile of the Project site. However, since the Project will be located at an existing site, the Project will not have a significant impact on these historic sites. Tomberg/Smith pf. at 14.

25. There are no known irreplaceable natural areas, endangered species sites or areas of necessary wildlife habitat in the Project area. Tomberg/Smith pf. at 12.

Development Affecting Public Investments

[10 V.S.A. § 6086(a)(9)(K)]

26. The Project will not unnecessarily or unreasonably endanger any public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the

function, efficiency, or safety of, or the public's use or enjoyment of or access to public investments. Joint Panel pf. at 26.

Town and Regional Plans

[30 V.S.A. § 248a(c)(2)]

27. The Project is consistent with the land conservation measures contained in the Hyde Park Town Plan and the Lamolille County Regional Plan. Lind/Marcoux pf. at 3.

State and Local Permits

[30 V.S.A. § 248a(d)]

28. No land use permits currently exist for the subject property. The existing tower was constructed prior to 1970 and no permit was required at that time. Lind/Marcoux pf. at 15-16.

III. DISCUSSION

The MOU

Pursuant to the terms and conditions of the MOU, the Neighbors and the Petitioners have agreed to address the aesthetic impacts of the Project through a reduction in the height and girth of the tower, a reduction in the number of antennas to be attached to the tower, and the removal of the Manosh Tower. The MOU contains specific details regarding the revised tower design. The MOU also sets forth a plan to ensure removal of the existing Manosh Tower.

After reviewing the MOU submitted by the Petitioners and the Neighbors, I conclude that in general the MOU represents a reasonable compromise addressing the concerns of the Neighbors while not frustrating the goals of the Project. However, I have several concerns regarding the portion of the MOU regarding removal of the Manosh Tower, and I recommend that the Board not approve this portion of the MOU.²

This section of the MOU requires that, in the event the Manosh Tower is not removed from the site within six months of Project construction commencement, the Neighbors can enforce removal of the Project. Additionally, the MOU requires the Petitioners to post a surety bond with the Board upon which the Neighbors can draw to finance the Project removal.

2. MOU at Section C.

I find unacceptable the provision in the MOU authorizing the Neighbors to remove the Project, in the event the Petitioners are unsuccessful in having the Manosh Tower removed. The Neighbors have no apparent experience in construction or decommissioning of telecommunications facilities, nor are the Neighbors subject to the Board's jurisdiction. Accordingly, having the inexperienced Neighbors remove the Project could result in unnecessary environmental damage and/or delays that would not be subject to Board authority. In addition, by agreeing to decommission the Project at considerable expense should an agreement with the owner not be reached, the Petitioners will have put themselves in a potentially difficult bargaining position with respect to the terms of that agreement. Manosh will be in a position to demand highly favorable terms from the Petitioners, knowing that the Petitioners will incur significant expense to decommission the Project should an agreement not be reached. Therefore, I recommend inclusion of a condition requiring that the Petitioners, prior to commencement of Project construction, secure either an agreement with Manosh for removal of the tower, or an order from a court of competent jurisdiction requiring removal of the tower by a date certain.³ Should the parties agree to an alternative condition regarding removal of the existing tower, they may file the condition as part of their comments on this Proposal for Decision.

IV. CONCLUSION

Pursuant to 30 V.S.A. § 248a(a):

Notwithstanding any other provision of law, if the applicant seeks approval for the construction or installation of telecommunications facilities that are to be interconnected with other telecommunications facilities proposed or already in existence, the applicant may obtain a certificate of public good issued by the public service board under this section, which the board may grant if it finds that the facilities will promote the general good of the state consistent with subsection 202c(b) of this title.

Further, pursuant to the Procedures Order:

Unless the Board determines that an application raises a significant issue, it shall issue a final determination on an application within 90 days of its filing

3. It is important to note, that I have reached no conclusion regarding whether leaving the existing tower at the site would result in undue adverse aesthetic impacts, or whether requiring removal of the existing tower is necessary for Board approval of the Project. I have included this condition solely because the Petitioners and the Neighbors have agreed to such a condition in the MOU.

Based upon all of the above evidence, the petition does not raise a significant issue with respect to the relevant substantive criteria of 30 V.S.A. § 248a, the public interest is satisfied by the procedures authorized in 30 V.S.A. § 248a, and the proposed Project will promote the general good of the State.

For the reasons set forth above, I recommend that the Board approve the Petitioners' request for approval of the petition as amended pursuant to the MOU.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 31st day of October, 2011.

s/Gregg Faber

Gregg Faber
Hearing Officer

V. BOARD DISCUSSION

On October 21, 2011, the Petitioners, the Neighbors, and the Department each filed comments on the proposal for decision.

The Petitioners "express no objection to the procedural history, findings, order and certificate of public good as proposed."⁴ However, the Petitioners argue that the Board should not "adopt verbatim" the Hearing Officer's discussion related to Section C of the Stipulation because the Hearing Officer "was not privy to the multitude of facts and strategic considerations that led Petitioners to accept" that section of the Stipulation. Further, the Petitioners maintain that it would be sufficient for the Board to make reference to the exclusion of Section C of the Stipulation "for the reasons set forth in the Hearing Officer's proposal for decision."

The Neighbors state that they "have no objections to the draft order and proposed CPG."⁵ The Neighbors state that "their position is based on the fact that the proposed draft incorporates the remaining provisions of the MOU into both the Order and proposed CPG."

The Department states that it "has no objection to the entry of an Order based on the Proposal for Decision, nor does it object to the language changes" proposed by the Petitioners.

We find the comments filed by the Petitioners to be unpersuasive and puzzling for a number of reasons.⁶ The Petitioners are apparently requesting that the Board adopt only certain portions of the Hearing Officer's discussion related to Section C of the Stipulation, but they have neglected to specify which portions are acceptable to them. The Petitioners also state that the Hearing Officer was "not privy" to the reasons underlying the Petitioners' acceptance of Section C of the Stipulation. However, they have chosen not to supply those reasons nor have they explained how this knowledge would have impacted the Hearing Officer's recommendation in this regard. Thus, the Petitioners have failed to identify: (1) the specific language to which they object; and (2) any error in the Hearing Officer's analysis. Therefore, we adopt the Hearing Officer's discussion as proposed.

4. Petitioners' Comments at 1.

5. Neighbors' Comments at 2.

6. We also find the Department's unqualified support of the Petitioners' unspecified and unsupported "language changes" without further explanation, to be similarly perplexing.

With respect to the Neighbors' comments, the proposed order at Paragraph 3 and the proposed CPG at Condition (1) clearly state that the terms and conditions of the Stipulation, with the exception of Section C, "are incorporated herein by reference." Therefore, the terms and conditions of the entire Stipulation are already incorporated by reference in both the Order and CPG as requested by the Neighbors and no modification to the order or CPG is necessary.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board ("Board") of the State of Vermont that:

1. The findings, conclusion, and recommendation of the Hearing Officer are adopted.
2. The construction of a telecommunications facility in the Town of Hyde Park, Vermont, by petition filed by the Lamoille County Sheriff's Department ("LCSD"), the Vermont Communications Board, and Vermont Transco LLC (collectively, the "Petitioners"), in accordance with the evidence and plans submitted in this proceeding, will promote the general good of the State of Vermont, pursuant to 30 V.S.A. Section 248a, and a certificate of public good to that effect shall be issued in this matter.
3. The terms and conditions of the Memorandum of Understanding dated August 23, 2011 ("MOU"), with the exception of Section C, are incorporated herein by reference. Without limitation, the conditions on the construction and operation of the telecommunications facility include the following:
 - a. Petitioners shall not install or cause to be installed in the area between the 90 and 100-foot sections of the agreed-upon tower either of the following: (i) panelized antennas with an aggregate surface area of 2 square feet on one side; and/or (ii) a microwave antenna with a diameter of greater than 18 inches.
 - b. Whip antennas may exceed the top of the 90-foot tower by up to ten (10) feet. No antennas placed on the tower extension shall tip higher than the 105-foot level.
 - c. Petitioners may install a lightning arrester up to 5 feet higher than the tallest antenna.

- d. Only antennas used by Petitioners (including the constituent public and volunteer services, electrical transmission and distribution utilities, and first responders that the antenna equipment associated with the Project is intended to serve) for public safety may be installed between the 90-foot and 100-foot sections of the tower.
 - e. No structural extensions between the 90-foot and 100-foot levels shall be built unless and until a need arises. Petitioners shall make commercially reasonable efforts to place any additional, future antenna, dish, or other attachment at 90-feet or below, including, where feasible, through relocation of existing antennas.
 - f. Petitioners, including but not limited to LCSD, shall not sign or enter into agreements with commercial users for space on the tower that will interfere with currently foreseeable public safety uses.
 - g. Any tower extension between the 90-foot and 100-foot elevations shall be designed to minimize any aesthetic effect on the surroundings while at the same time meeting a structural standard reasonably necessary to accommodate the proposed equipment.
 - h. Any tower extension shall not have a girth greater than what is reasonably necessary to accommodate the equipment, as determined by a licensed structural engineer, and shall in no case exceed the maximum width of 18 inches.
 - i. Petitioners shall notify the Neighbors via mail thirty days prior to filing with the Public Service Board any proposal to extend the tower to 100 feet. This obligation pertains only to the Neighbors identified in the MOU, and does not run with the land or to said Neighbors' successors, assigns, heirs, personal administrators, and the like.
4. The Petitioners shall construct, operate, and maintain the project in accordance with the plans and evidence submitted in this proceeding, and specifically the tower design prepared by Valmont Industries, Inc. dated August 25, 2011, and submitted to the Board on September 2, 2011. Any material or substantial change in the project is prohibited without prior Board approval.

5. Following construction, Petitioners shall ensure that the communications facility is operated so as not to cause objectionable noise, vibrations, or odors beyond the property limits on which the project is located.

6. Prior to commencement of project construction, the Petitioners shall secure either an agreement with H.A. Manosh, Inc., for removal of the existing tower at the site, or an order from a court of competent jurisdiction requiring removal of the existing tower by a date certain.

DATED at Montpelier, Vermont, this 7th day of November, 2011.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

Filed: November 7, 2011

Attest: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.